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No.

IN THE
SUPREME COURT OF THE UNITED STATES

APRIL TERM 1981

WAYNE SHERRARD and JANET SHERRARD, his wife,

Petitioners,

v.

DONALD S. OWENS, Judge of Probate, Ingham County Probate Court,

et al.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the court of appeals is in conflict with this Court's decision in Smith v. Organization of Foster Families, 431 U.S. 816 (1977), in that it fails to recognize any constitutionally protected liberty interest on the part of the Petitioners.

2. Whether the reliance of the court of appeals on the finding of the district court that the Petitioners were afforded an adequate due process procedure with regard to the licensing provisions of Michigan law was error, in that the state administrative law judge found that the Petitioners were not accorded due process.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

January 14, 1980, Motion for Summary Judgment in Favor of the Defendants Granted

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

March 18, 1981, Judgment of the District Court Affirmed

OPINIONS BELOW

The opinion below by the Circuit Court of Appeals for the Sixth Circuit is a per curiam decision which has not yet been published. The opinion below by the District Court for the Western District of Michigan is published at 484 F. Supp. 728. The opinions of the Sixth Circuit and of the Administrative Law Judge are set out in Appendix A.

JURISDICTION

The Petitioners, Wayne and Janet Sherrard, are seeking review of the judgment below entered in favor of the Respondents: Donald S. Owens, Judge of Probate Court, Ingham County, Lansing, Michigan; Michigan Department of Social Services; Family and Child Services of the Capitol Area, Inc.; Lucille Barber, individually and as employee, acting director and board member of Family and Child Services of the Capitol Area, Inc.; Mary Ellen

Heater, individually and as employee of Family and Child Services of the Capitol Area, Inc.; Barbara McLean, individually and as employee of Family and Child Services of the Capitol Area, Inc.; Timothy G. Holland, Attorney at Law, individually and as guardian for Candace and Vernita Smith, Minors; jointly and severally. The judgment of the Court of Appeals for the Sixth Circuit was entered on March 18, 1981. This petition for certiorari was filed within ninety days of that date. 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

U.S. Const. amend. XIV, § 1

> Section 1. Due process of law
> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

28 U.S.C. § 1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of

a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985(3)

§ 1985.

. . . .

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire . . . , for the purpose of depriving, either directly or indirectly, any person or class

of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . .

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court

> having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

On May 15, 1978, the Petitioners, Wayne and Janet Sherrard, took custody of Candace and Vernita Smith as foster parents, pursuant to an order of the Director of Children's Services. The Sherrards at that time were granted a six-month provisional foster-home license, which was renewed for another six-month period in November of 1978.

The foster children lived with the Sherrards for one year, at which time

a case worker from Family and Child Services of Michigan, Respondent Mary Ellen Heater, obtained an ex parte order from Respondent Donald S. Owens, Judge of Probate, removing the foster children from the Sherrard home on the grounds that the Family and Child Services Agency was not recommending renewal of the Sherrard's foster home license.

The children were removed from the Sherrard's home on May 14, 1979, and placed in another foster home. The Sherrards then appealed the decision not to renew the foster home license through a hearing before an Administrative Law Judge pursuant to Mich. Comp. Laws Ann. § 722.121(2); Mich. Stat. Ann. § 25.358(21)(b). In this hearing, the Sherrards claimed that the Family and Child Services Agency had not complied with § 92 of the Michigan Administrative Procedures Act in denying the renewal

of the foster home license. By opinion dated March 26, 1980, the Administrative Law Judge found that the agency had failed to comply with the notice and hearing provisions of § 92. By order dated April 4, 1980, John T. Dempsey, Director of the Department of Social Services, accepted the findings of the Administrative Law Judge and ordered the matter to be referred to the Family Home Licensing Division for further proceedings. On July 21, 1980, the Director of the Bureau of Regulatory Services issued a letter whereby the Sherrard's foster home license was renewed, effective May 15, 1979, as a regular day care license.

The Sherrards filed the complaint in the instant action in the United States District Court for the Western District

of Michigan on August 15, 1979. The Respondents filed a Motion to Dismiss which was converted to a Motion for Summary Judgment and was granted by order and opinion dated January 14, 1980. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the district court in a per curiam opinion dated March 18, 1981.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN SMITH V. ORGANIZATION OF FOSTER FAMILIES, 431 U.S. 816 (1977), IN THAT IT FAILS TO RECOGNIZE ANY CONSTITUTIONALLY PROTECTED LIBERTY INTEREST ON THE PART OF THE PETITIONERS.

In Smith v. Organization of Foster Families, 431 U.S. 816 (1977), this Court addressed the issue of whether a foster family may assert a liberty interest in the continued care of their foster children which requires the guarantees of due process prior to removal of the

children from the home. The Court decided the case without specifically holding that a liberty interest exists, choosing rather to reverse the district court on the issue of the adequacy of New York's pre-removal procedures. In so doing, however, the Court's extended discussion indicates that its decision was based in large part on the complex and thorough pre-removal procedures which existed in New York, and on the fact that the biological parents asserted a right to regain custody of their children, and this right was seen to take precedence over the rights of the foster parents to a continued foster family relationship.

The Petitioners respectfully submit that the court of appeals failed to consider the importance of these factors to the holding of Smith, and that therefore that court's finding that a constitutionally protected liberty interest does not exist in the instant case, where the crucial

factors of Smith are not present, is error.

The Petitioners acknowledge the fact that this Court did not explicitly hold in Smith that a liberty interest exists in long-term foster parents such that they are entitled to full due process protections. Nevertheless, the Smith opinion allows the inference to be drawn that a certain set of facts could exist which would give rise to a constitutionally protected interest. In this regard, the Petitioners cite Judge Tuttle of the Fifth Circuit who, in his dissenting opinion in Drummond v. Fulton County Department of Family and Child Services, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978), presented the following analysis:

> A careful reading of the opinion indicates to me that but for the existence of the narrower ground in that case and but

for the fact that the contest before the court was being waged between foster parents on the one hand and natural parents on the other, the court would readily have determined that such constitutionally protected liberty interest did exist. In the first place, the court recognized that, although "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element" and that "a biological relationship is not present in the case of the usual foster family" nevertheless "biological relationships are not exclusive determination of the existence of a family." Ibid. 431 U.S. 843, 97 S.Ct. 2109-10. Most telling is the following language from the Court's opinion:

> "Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments

that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, Wisconsin v. Yoder, 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972), as well as from the fact of blood relationship. No one could seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. (Footnote omitted). At least where a child had been placed in foster care as an infant[,] has never known his natural parents and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill

> the same socializing functions, as a natural family. (Footnote omitted). For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals. Cf. Village of Belle Terre v. Barass, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974)." [Emphasis added.] Ibid. 431 U.S. 844, 97 S.Ct. 2111.

Following this language, the Court pointed up the distinctions between the foster family and the natural family, particularly in light of the fact that the foster family is a creation of statute and the Court concluded this discussion by saying:

> "In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty'." [Emphasis added.]

The Court then discussed the posture of the OFFER case

as being a contest between foster parents and the natural parent of a child. The Court then said:

> "It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they are freely entered, even in the absence of biological connection or state law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution that interest must be substantially attenuated where the proposed

> removal from the foster family is to return the child to his natural parents." [Emphasis added.]
> Ibid. 431 U.S. 846, 97 S.Ct. 2111.

563 F.2d at 1213-14 (Tuttle, J. dissenting; joined by Goldberg, J.).

The Petitioners point out that, unlike in Smith, in the instant case Michigan statutes provide no procedures for removal of children from foster homes. Thus, even the minimal liberty interest recognized by the Court in Smith is unprotected by the Michigan statutory scheme. In addition, the natural parents of the children in the instant case are not parties to the lawsuit, the state probate court having terminated all rights of the natural parents by order of June 12, 1979. The second consideration of the Court in Smith, then, is not present in the instant case. The Petitioners therefore urge that the court of appeals

erred in failing to acknowledge the clear factual differences between the instant case and Smith, thereby failing to give effect to the clear import of Smith that long-term foster parents in the situation of the Petitioners are entitled to due process protection.

II. THE COURT OF APPEALS' RELIANCE ON THE FINDING OF THE DISTRICT COURT THAT THE PETITIONERS WERE AFFORDED AN ADEQUATE DUE PROCESS PROCEDURE AS REGARDS THE LICENSING PROVISIONS OF MICHIGAN LAW WAS ERROR, IN THAT THE STATE ADMINISTRATIVE LAW JUDGE FOUND THAT THE PETITIONERS WERE NOT ACCORDED DUE PROCESS.

The district court in its opinion examined the licensing provisions of Michigan law concerning foster homes, found them to be constitutionally adequate, and found that the Defendants had substantially complied with those provisions. Sherrard v. Owens, 484 F. Supp. 728, 741-43 (W.D. Mich. 1980). Subsequent to the district court's decision, in an

opinion dated March 26, 1980, Administrative Law Judge John N. Atkinson found that the Petitioners were not afforded the due process procedures required by Michigan law and recommended that the case be returned to the licensing authorities for further action. The licensing authority, by letter dated July 21, 1980, reversed the prior decision to terminate the Petitioners' license and renewed the license, effective May 15, 1979. Thus, to the extent that the district court's decision rested on a finding that the Petitioners' loss of license justified the removal of the children from the home, the decision must be viewed as erroneous, since the Petitioners did not in effect ever lose their license. The Petitioners asserted this argument below, and now claim that it was error for the court of appeals to fail to give effect to the state administrative procedures which clearly

contradict the finding of the district court judge that due process had been afforded the Petitioners. The district court in its opinion stated:

> As a practical matter in the facts of this case it makes little difference that Michigan laws apply to licensing rather than to removal since the two foster girls were removed from the foster home on the day the Sherrards' license expired. What New York law provides that Michigan laws do not is notice and a hearing before removal. Michigan law provides notice before a change in the license. The fact that the children were physically removed before an administrative hearing was held is immaterial to the rights of the Sherrards. What is important is the statutory right of the foster parents to a hearing, to have their lawyer present, to present evidence and to appeal an adverse decision to the state circuit court. The children remained at all times in the

> county and had there been a reversal of the decision to revoke the license, the children were physically available for return to the Sherrards' home.

484 F. Supp. at 743. Thus, the court assumed that the compliance of the Defendant state authorities with the Michigan licensing procedures adequately protected the petitioners' interest, and rested its dismissal of the action on that ground.

It is the Petitioners' position that the subsequent state administrative decision which effectively negated the district court's finding was entitled to consideration by the court of appeals. The court, however, merely affirmed the district court's decision without discussing the effect of the state procedures on the district court's findings. This summary affirmance is urged by the Petitioners to be error which requires reversal of the court of appeals' decision.

CONCLUSION

Based on the foregoing, the Petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

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Owosso, Michigan 48867

No. 80-1102
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYNE SHERRARD and JANET SHERRARD,

Plaintiffs-Appellants,

v.

DONALD S. OWENS, JUDGE OF PROBATE COURT, INGHAM COUNTY; MICHIGAN DEPARTMENT OF SOCIAL SERVICES, FAMILY & CHILDREN SERVICES OF THE CAPITAL AREA: LUCILLE BARBER, Individually and as an employee; BARBARA McLEAN, employee; TIMOTHY G. HOLLAND, Attorney, Individually and as Guardian for Candace and Vernita Smith, Minors,

Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed March 18, 1981.

Before: WEICK, LIVELY and ENGEL, Circuit Judges.

PER CURIAM. The plaintiffs appeal from summary judgment in favor of the defendants in this action brought pursuant to 42 U.S.C. §§ 1983, 1985 and

1988 seeking a declaratory judgment, preliminary and permanent injunctions and money damages. In their complaint the plaintiffs alleged that the defendants, state officers, employees and agencies, had deprived them of a constitutionally protected "liberty" interest without due process of law. The liberty interest asserted by the plaintiffs arose out of "a viable familial relationship" which developed between the plaintiffs, their adopted son and two children who were placed with the plaintiffs as foster parents by the Probate Court of Ingham County, Michigan.

The first ground for reversal urged by the plaintiffs on appeal is that the district court improperly "converted" a motion by various defendants to dismiss the complaint under Rule 12(b)(6), Fed. R. Civ. P. into a motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P. Upon consideration of the record

the court notes that at least one defendant also moved for summary judgment under Rule 56 and that the district court received matters outside the pleadings from various parties, including the plaintiffs. It is clear from the record that the plaintiffs were not taken by surprise as a result of the court's determination to treat the case as submitted for summary judgment and that they had adequate opportunity to present documentary materials to the court. See Kistner v. Califano, 579 F.2d 1004 (6th Cir. 1978). It further appears that the district court relied only on uncontradicted facts in reaching its determination that the defendants were entitled to judgment as a matter of law.

Though the plaintiffs invited this court to make a much broader determination on the question of whether foster parents have a constitutionally protected liberty interest in the relationship between

them and foster children placed in their homes, the court concludes that the present case may be decided on its particular facts and that a broader determination is not required. In this case the plaintiffs had only a six-month temporary license to conduct a foster family home at the time the two foster children were placed with them. Furthermore, the contract between the state agency and the plaintiffs placing the two children with the plaintiffs provided specifically that the state agency retained responsibility for permanent placement of the foster children. Under these circumstances, the court concludes that at most the plaintiffs had an expectation of continuing as foster parents of the two children in question and that this did not rise to the level of a constitutionally protected liberty interest. The district court also found that Michigan affords an adequate due process procedure before a foster

home care license may be revoked. The record supports this finding as well.

The judgment of the district court is affirmed.

STATE OF MICHIGAN

DEPARTMENT OF SOCIAL SERVICES

BUREAU OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF: Wayne and Janet Sherrard,
Licensees
Reg. No. 79-08540(9002)
Case No. F7800854H

HEARING DATE: January 7, 1980
Shiawassee County DSS

ADMINISTRATIVE LAW JUDGE: JOHN N. ATKINSON

DECISION

The Opinion of the Administrative Law Judge and Recommendations in the above entitled matter have been read and considered, together with the entire record of the hearing. Said Opinion is attached hereto and made a part hereof. It is my decision that the Department in its efforts not to renew the foster care license, failed to act in substantial compliance with

applicable rules, and in particular Section 92 of the Michigan Administrative Procedures Act.

ORDER

Pursuant to 1973 PA 116, as amended, this matter is to be referred to the Family Home Licensing Division for further action to be taken by them as required by Section 92 of the Michigan Administrative Procedures Act.

John T. Dempsey /s/
John T. Dempsey, Director

Dated: 4/4/80

Date Mailed: Apr 9 1980

EXHIBIT "B"

NOTICE: The law provides that within 10 days of receipt of the above Decision and Order the claimant may appeal it to the circuit court for the county in which he lives.

cc: Wayne and Janet Sherrard

Fernando Gomez
Gerald Stevens
Shiawassee County DSS
Harold Gazan (3)
Judge John N. Atkinson
Administrative Hearings (4)

STATE OF MICHIGAN

DEPARTMENT OF SOCIAL SERVICES

BUREAU OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF: Wayne and Janet Sherrard,

Licensees

Reg. No. 79-08540(9002)

Case No. F7800854H

Date: January 7, 1980

Time: 9:00 a.m.

Shiawassee County
DSS

OPINION OF THE ADMINISTRATIVE LAW JUDGE

ADMINISTRATIVE LAW JUDGE: JOHN N. ATKINSON

PRESENT AT HEARING: Fernando Gomez, Assistance Attorney General
David Fitzgerald, Family Services
Donald Peters, Attorney
George Hare, Attorney
Gerald Stevens, Attorney
Wayne Sherrard, Licensee
Janet Sherrard, Licensee

EXHIBITS ADMITTED INTO EVIDENCE

Department Exhibit - Brief of Assistant Attorney General

Claimant Exhibit - Brief of Licensees' Attorney Gerald M. Stevens

EXHIBIT "C"

This case is before the Administrative Law Judge pursuant to MCLA 722.121(2); MSA 25.358(21)(b) upon claimant's request for a hearing to protest the decision by the Director of the Department of Social Services (DSS) not to renew the foster home license. A preliminary hearing was scheduled on the above date to resolve procedural issues in accordance with MCL 24.280. The preliminary hearing determined that four issues were to be resolved but based upon this decision the following two issues are deemed to be the only two issues material to this case.

ISSUES

(1) Were the licensees given proper notice of the factual conduct upon which DSS is basing its action in not renewing the license?

(2) Have the licensees been given an opportunity to show compliance with

all lawful requirements for retention of their license?

SUMMARY OF THE EVIDENCE

The Sherrards were given a provisional foster care license in May, 1978, which was renewed on a provisional basis on 11/15/78, the provision being that psychological counseling be undertaken by the licensees because of emotional problems of William, a minor child already in the home.

As a result of the above license, two minor children were placed in the Sherrard's home. These children continued to live there until 5/14/79 when they were then taken by the DSS and placed elsewhere.

The Sherrards protest the children being removed from their home and also the procedure followed by the Family Home Licensing Division (hereinafter Licensing Division) a subdivision of

the DSS, in its actions leading up to the department's decision not to renew the license. The specific objections are the issues set forth above.

The Licensing Division utilized the Family and Child Service of the Capital Area, Inc. (hereinafter Family and Child Services) to oversee the Sherrard's foster home and to conduct specific investigations. The Family and Child Services is a private organization and is not in any way a part of the DSS.

Peggy Palmiter, an employee of Family and Child Services, investigated and reported for both provisional licenses. The reports reflected that William, the adopted son of the Sherrard's had emotional problems and as a result, psychological counseling was recommended for the family. Evidence suggests initial cooperation and a later failure by the licensees to continue with this recommendation.

The licensees were orally informed on 4/26/79, by Ellen Heater, an employee of Family and Child Services that their license would not be renewed on 5/14/79. No reason was given. It was on or about 5/14/79 that the two children were removed from the home and the reason given therefore was that the foster license would not be renewed.

On June 6, 1979, the licensees received a letter from Dr. Lucille K. Barber, then Acting Director of Family and Child Services, which stated in part, "We anticipate we will not renew your license for reasons described in Rules 15, 17, 25, and 33 of the booklet, 'Rules for licensing' issued by the State Department of Social Services. These rules refer to matters of Mental health, cooperation with the Agency and the needs of children, and matters concerning punishment. At our informal conference next week we can

discuss this further. If you have further questions regarding our assessment, please feel free to bring them up at our conference."

On June 5, 1979, a letter was directed to the licensees from the Licensing Division which offered an informal conference to discuss future licensing actions of the DSS. The letter in addition stated that the recommendations of Family and Child Services would be sought in regards to license renewal and the "rule related facts" upon which the recommendation would be based.

The licensees attended the conference with their attorney. At the preliminary hearing in this matter, the only person who offered testimony as to what transpired at that conference was the licensees' attorney who stated that nothing was said regarding the reasons for not renewing the license except that the license had expired.

On 9/14/79, a letter from John T. Dempsey to the Sherrard's specified the violations of four specific licensing rules and facts upon which the DSS felt supported its position. This letter further stated that the Sherrard's license would not be renewed and if they disagreed with this decision, an administrative hearing could be requested.

A request for a hearing was filed on 9/27/79.

The DSS's brief also contained reference to a 12/27/78 report which reflected certain rules and violations. The record is not clear as to what they may have been or who furnished it.

The licensees' position is that prior to receipt of the 9/14/79 letter, they did not specifically know why the DSS was refusing to renw their license and could not therefore rebut or correct them prior to the denial of the license.

The DSS's position is (1), that through the verbal and written communications with the licensees they had notice of the facts or conduct which warranted denial of the license or (2) if proper notice and opportunity to comply was not given, such was not necessary under the Michigan Administrative Procedures Act because of the psychological problem that allegedly exists which because of its nature could not be immediately corrected.

FINDINGS OF FACT

The Administrative Law Judge, upon the competent, material and substantial evidence on the whole record, finds the material facts to be as stated in the Summary of the Evidence.

CONCLUSIONS OF LAW

The Michigan Administrative Procedures Act, Section 92 requires the following:

> "Before the commencement or proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license an agency shall

> give notice, personally or by mail, to the licensee of the facts or conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license. If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the license, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined."

It is clearly spelled out in the above section that the agency, in this case the DSS, is the moving party. The denial or revocation of a license is departmental prerogative. The act does not give the agency the right to assign to another the authority to cancel or deny a license. In the present case, therefore, it is the DSS's right to cancel the Sherrard's license, if appropriate, and the DSS must assume the responsibility of giving proper notice. No other

person or organization has this authority.

Thus, the alleged notices given by Ellen Heater and Dr. Lucille K. Barber, both employees of Family and Child Services were inadequate to properly advise the licensees of the DSS's proposed actions. It is not surprising that Dr. Barber's letter stated that she "anticipated" we will not renew your license for she has no authority to grant or deny the license. In addition, the letter from the Licensing Division to the licensees states that the Division will seek the recommendations of the Family and Child Services in making the license renewal decision.

Also, Ellen Heater, as a Family and Child Services caseworker, would not on her own even if she were a DSS employee, have the authority to decide the question of denial of the license to the Sherrards. Actions of Ellen Heater

could not bind the department. Thus, information furnished to the licensees by any one other than an authorized party of the DSS has no legal consequence in the department's action to deny the foster home license to the Sherrards. To decide otherwise would make the DSS responsible for actions of people over whom it had no control.

The 12/27/78 report, although not clear from the record, is believed to have been originated by the Family and Child Services and its effectiveness is governed by the reasons stated above.

The only other time the department claims the licensees were given notice was by the letter from the Licensing Division, dated June 5, 1979, and the conference of June 13, 1979.

This letter specifies no rule violation of any kind. Except for the introductory paragraph, names and the date of the

appointment, it is a form letter applicable to any situation.

It does state that the purpose of the proposed conference was to give the licensees an opportunity to show compliance. Therefore, the licensees must have been advised prior to the conference of any proposed rules violation for the letter to have any legal purpose.

In this case, they were not so advised. At the time of the conference, based upon the evidence presented at the hearing, the licensees did not know the specific violation the DSS was considering as a basis for the denial of the license. Thus, they did not know what evidence to obtain or present at the conference.

It also follows that the licensees were therefore not given an opportunity to show compliance.

The DSS also argued that Section 92 of the Michigan Administrative Procedures Act does not apply where the alleged

violation is one of an emotional nature, a problem not immediately correctible as would be a defective structure.

This argument is based upon the finding of an ex-party investigation. It presumes the existence of the defect and then continues the argument based upon the defects existence. If the defect does not exist, the argument based thereon falls. The question to be answered therefore in this type of case is whether the defect actually exists and if so, the degree thereof. The licensees should be advised of what the DSS is considering as a reason for denying the license so that the licensees are afforded the right to secure expert testimony to show either no emotional problem exists or, if it does, if it is of a minor nature. The question resolves itself to be one of proof.

RECOMMENDED DECISION

After a careful review of the entire

record of these proceedings and based upon the substantial credible evidence and the findings of fact and conclusions of law, the Administrative Law Judge recommends a finding that Section 92 of the Michigan Administrative Procedures Act was not complied with in that the licensees were not properly notified of the facts or conduct which warrant the denial of a foster home license. In addition, they were, therefore, not afforded an opportunity to show compliance with all lawful requirements for the retention of the license. It is further recommended this matter be referred to the Division of Family Home Licensing for further action.

John N. Atkinson /s/

John N. Atkinson,
Administrative Law Judge

Dated: 3-26-80

JNA:fgw

cc: Wayne and Janet Sherrard

Fernando Gomez
Gerald Stevens
Shiawasee County DSS
Harold Gazan (3)
Judge John N. Atkinson
Administrative Hearings (4)

STATE OF MICHIGAN

William G. Milliken, Governor
DEPARTMENT OF SOCIAL SERVICES
300 South Capitol Avenue, P.O. Box
30037, Lansing, Michigan 48909
JOHN T. DEMPSEY, Director

July 21, 1980

Mr. Gerald M. Stevens
Attorney at Law
319 East Main Street
Owosso, Michigan 48867

Dear Mr. Stevens:

This letter is to inform you of my decision with regard to the status of the foster home license issued to Mr. and Mrs. Wayne Sherrard, and to provide you with a brief summary of the bases for my decision.

First, I will summarize the purpose of the informal conference. The purpose of the informal conference was to carry out the intent of Dr. Dempsey's order that the matter of the Sherrard's license be referred back to the Division of Family Home Licensing for further action, which action is to be taken in accordance with

the provisions of Section 92 of the Michigan Administrative Procedures Act. This order was the result of the administrative hearing conducted on January 9, 1980. The administrative law judge concluded that the Sherrards had not been "afforded an opportunity to show compliance with all lawful requirements for the retention of the license."

It was my purpose in holding the informal conference to limit the focus of attention to the question of current compliance. Essentially, I was concerned as to whether there was evidence to indicate whether the Sherrards are in compliance as of this date. It was not my purpose in having the informal conference to evaluate and decide upon the merits of the findings of the Family and Child Service of the Capitol Area, Inc. (hereinafter referred to as the "Certifying Agency"). The intent of Dr. Dempsey's

order was to correct a procedural flaw in the handling of this matter.

Second, I will summarize those facts which entered into my consideration and became the bases for my conclusions and decision.

1. The Shiawassee County Department of Social Services has recently completed an evaluation and investigation of the Sherrard's home in response to an application the Sherrard's filed to operate a licensed family day care home.

Based upon a telephone conversation with Mrs. Whittaker on July 17, 1980, during which time she reviewed the file, I noted the following observations of the licensing worker:

- The references received regarding the Sherrard's are "very good."
- The medical report is "perfectly favorable."

- Mrs. Sherrard is described as "demonstrating know-how" in the handling of children.

- The rule compliance record does not indicate any area of substantial noncompliance or any area of concern. (It was pointed out to me that the local health department had not yet provided the licensing worker with the results of the water sample analysis.)

- The licensing worker also discussed with the Sherrard's the possibility of the home being used for short-term foster placements. In this connection, the record indicates that the worker saw "no reason to not use the home" for short-term foster care placement.

2. The psychological evaluation completed by Lawrence Cowan, Ph.D. (Clinical Psychologist) on October 5, 1979 indicates the following:

"I doubt, however, that any kind of therapy for Mr. and Mrs. Sherrard would show much benefit; first of all because they are not disturbed individuals; secondly, I don't think their values are consistent with seeking psychological help for themselves. If no treatment is forthcoming for William, I would still expect that he would continue to show improvement, since he has made significant improvement without this treatment over the past year."

3. The key document and source of evidence upon which the certifying agency based its recommendation of August 28, 1979 to refuse to renew the license predate the agency's recommendation of December 27, 1978 to issue a second provisional license.

Third, based upon the above stated facts, a careful review of the Department's record on this matter, and the information

shared during the informal conference, I make the following decisions:

1. To renew the foster family home license effective May 15, 1979.

2. To transfer the supervisory responsibility for the Sherrard foster family home from Family and Child Services of the Capitol Area, Inc. to the Shiawassee County Department of Social Services effective July 18, 1980.

3. To renew the foster family home license to a regular license status, based upon the fact that there is no evidence of substantial noncompliance, and in fact, evidence exists based upon a recent family day care home licensing study that there is reasonable compliance.

4. To request the Shiawassee County Department of Social Services to do a re-evaluation of the Sherrard foster family home within six months

to assure ongoing compliance with licensing requirements.

Please find enclosed a copy of the license which has been issued. The original is being mailed to the Sherrards.

If you have any questions regarding the contents of this letter or the decisions which have been made, please do not hesitate to contact me.

Sincerely,

Harold S. Gazan /s/

Harold S. Gazan, Director
Bureau of Regulatory
Services

HSG/mn
Enclosure
cc: Mr. and Mrs. Wayne Sherrard
Kenneth Phelps, Director
Family and Child Services of the
Capitol Area
David V. Lorion, Director
Shiawassee County Department of
Social Services
David G. Fitzgerald, Director
Division of Family Home Licensing
Fernando Gomez
Assistant Attorney General

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES
LANSING, MICHIGAN 48926
LICENSE FOR THE CARE OF CHILDREN

In accordance with Act 116, Public Acts of Michigan 1973, a REGULAR License is hereby issued to SHERRARD WAYNE & JANET to conduct a FOSTER FAMILY HOME located at 4103 EAST WILKINSON OWOSSO county of SHIAWASSEE State of Michigan. Provider number FH7800854

This license is issued to care for children described as follows:

NO MORE THAN 02 CHILDREN FULL-TIME CARE

This license, valid only at the address shown above, is nontransferable and remains the property of the Michigan Department of Social Services.

A substantial violation of the provisions of the statute under which this license is issued, or of any of the rules and

regulations adopted by the Department and published in the State Administrative code will be cause for revocation. Any previously issued license is invalid.

By John T. Dempsey /s/
DIRECTOR
Date of Issue 05-15-79

LICENSE SUPERVISED BY

SHIAWASSEE COUNTY
DEPARTMENT OF
SOCIAL SERVICES
1025 NORTH SHIAWASSEE STREET
CORUNNA, MICHIGAN 48817

Date of Expiration 05-14-81

PLEASE POST IN A CONSPICUOUS PLACE

SHERRARD WAYNE & JANET
4103 E. WILKINSON
OWOSSO, MICHIGAN 48867

[Form]
DSS-3703 (Rev. 2-75)
Previous Editions Obsolete

ROBERT L. DRAKE
DONALD S. OWENS
Judges

Warren Ritter
Director of Children's Services
Douglas W. Slade
Probate Register
Michael J. Moran
Court Administrator

300 Ingham County Building
303 W. Kalamazoo Street
Lansing, Michigan 48933
Telephone (517) 485-1751

County Courthouse
Mason, Michigan 48854
Telephone (517) 676-5222

STATE OF MICHIGAN
INGHAM COUNTY PROBATE AND JUVENILE COURT

August 19, 1980

Mr. Gerald M. Stevens
319 E. Main Street
Owosso, Michigan 48867

Re: Wayne and Janet Sherrard

Dear Mr. Stevens:

Thank you for your letter of July 23, 1980, enclosing certain materials from the Department of Social Services. After reviewing them carefully, I will refer them to the caseworkers.

Sincerely yours,

Donald S. Owens /s/

DONALD S. OWENS
Judge of Probate

DSO/jll

EXHIBIT "B"

LAW OFFICES

GERALD M. STEVENS

319 East Main Street

OWOSSO, MICHIGAN 48867

TELEPHONE 725-5161

AREA CODE 517

August 26, 1980

Honorable Donald S. Owens
Ingham County Probate Court
303 West Kalamazoo
Lansing, MI 48933

RE: CANDACE AND VERNITA SMITH
WAYNE AND JANET SHERRARD

Dear Judge Owens:

Following your letter of August 19, 1980, I talked to Sue Boyd on August 26, 1980, in the absence of Elaine Ball. She indicated Jeff Venn is the caseworker. She further indicated that one of the girls is in psychological care and she would not recommend transfer to another home. I asked if the Sherrards could not follow through on the psychological

EXHIBIT "C"

care. She said it was too far and also there were negative results from the last contact with the foster parents.

I indicated the negative results were testified to in court on the basis of what the foster parents said when the parent was not available for examination. She indicated Mr. Venn had personally seen the results. This is contrary of my recollection of his testimony.

She further indicated the report from the Department of Social Services indicated William had improved since the girls had left. The report does not say this, nor did the evidence show anything other than continual improvement from the day of placement of the girls with the Sherrards.

She indicated she would be interested in further investigation only when the children are legally ready for adoption and on order of the court.

I pointed out whatever reasons were extant in the past which came from Family and Child Services were refuted by the Department of Social Services' finding. She offered no other reasons than those I have just set out.

Time is marching on unmercifully and for the benefit of all, and the children especially, the matter should be resolved. I would appreciate some indication or suggestion from you.

Thank you for your cooperation.

Very sincerely yours,

Gerald M. Stevens /s/

Gerald M. Stevens

GMS/jab

cc: Mr. and Mrs. Wayne Sherrard